Supreme Court, U.S.
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No. 87-904

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

AMERICANA CORPORATION, A Virginia Corporation,
Appellant,

v.

STATE HIGHWAY AND TRANSPORTATION COMMISSION,
Appellee.

On Appeal from the Supreme Court of Virginia

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the landowner can recover certain damages: to-wit, legal and accounting fees, economic and business losses absent a statute allowing recovery, upon the discontinuation of a condemnation suit, where the owner has continued in possession and the State has not exercised its right of entry so as to divest the owner of the use of its property.

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LACK OF JURISDICTION

This Court lacks jurisdiction because the landowner did not raise the constitutional issue it now raises in either the Trial Court or the Supreme Court of Virginia.

The question appealed from the Trial Court to the Supreme Court of Virginia was as follows: (Appellee's Appendix 13a) "Whether the Court erred in restricting evidence and testimony of damages to those damages directly related to the property and in ruling that testimony and evidence as to damage suffered relating to attorneys' fees, accountants' fees, business losses and economic damage during the pendency of the taking from January 7, 1972 to August 1, 1986 were not cognizable

in condemnation proceedings and are not contemplated by the provisions of Title 33.1 of the 1950 *Code of Virginia*, as amended."

As can be seen from the petition filed with the Supreme Court of Virginia (Appellee's Appendix 6a), the Fifth Amendment objection was not raised, nor was it raised by the landowner's Answer [1] (Appellee's Appendix 1a) so that the landowner now attacks the constitutionality of this statute and its application for the first time. Such an attack for the first time comes too late. See *Cardinale v. Louisiana*, 394 U.S. 437, 22 L.Ed.2d, 398, 88 S.Ct. 1162 (1968).

ADDITIONAL STATEMENT OF THE CASE

Appellee, State Highway and Transportation Commissioner (hereinafter referred to as "State"), while not wanting to overburden the Court, finds it necessary to present additional factual aspects of this case because the petitioner's statement is incomplete.

The State instituted condemnation proceedings against the landowner by filing a Certificate of Take, under what is commonly known as the "quick take" method, for the improvement of Route 1, a State Highway located in Crystal City, Arlington, just south of Washington, D.C. The landowner refused the State's offer of $1,596,295 and the Certificate of Take was filed on January 7, 1972, vesting defeasible title in the State, *Va. Code* § 33.1-122.[2]

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[1] Va. Code, § 25-46.9 provides in part ". . . any such owner who desires to assert any objection or defense to the taking or damaging of his property or to the jurisdiction of the court to hear the case and to proceed with the appointment of commissioners shall file his answer and grounds of any objection or defense to the taking or damaging of his property or to the jurisdiction of the court to hear the case . . . ."

[2] "The certificate of the Commissioner shall be recorded in the clerk's office of the court where deeds are recorded. Upon such

The Certificate of Take permitted the landowner to withdraw the amount offered, which the landowner elected not to do. The State commenced construction on the landowner's ("Americana") property, but was enjoined, pending its filing of an expanded Environmental Impact Statement, by the U.S. District Court for the Eastern District of Virginia, on March 1, 1977. The injunction continued until May 14, 1985, when the injunction was lifted and the State resumed construction.

Though the State did some preliminary construction [3] work which affected the subject property in 1975, the landowner at all times had possession and full use of the 103 unit motel located thereon. From 1972 to date, the landowner paid no monies to the State, such as lease payments.

After the lifting of the injunction in 1985, the State initiated a petition to appoint commissioners, the statutory method of initiating condemnation proceedings, *Va. Code*, § 25-46.9 [4] which was preliminary to a determination of fair market value of the property taken.

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recordation, the interest or estate of the owner of such property shall terminate and the title to such property or interest or estate of the owner shall be vested in the Commonwealth . . . ."

[3] Americana had access along two major roads, one on the front and the second, along Eads Street to the rear. While there was some construction along Route 1, which interrupted access for a short period of time, there was always complete and uninterrupted motor vehicle and pedestrian access to the Motel from Eads Street. The Motel never closed operation.

[4] "Proceedings for condemnation shall be initiated by filing the petition referred to in § 25-46.7 in the court, or in the clerk's office thereof, having jurisdiction under § 25.46.4. Upon the filing of such petition, the petitioner shall give the owners twenty-one days' notice of the filing of such petition and of its intention to apply to the court for the appointment of commissioners to ascertain just compensation for the property to be taken . . . ."

Under *Virginia Code*, § 33.1-90, if the State had not "let the contract" or (if) construction (was not) commenced within a period of twelve years, then upon written demand, the property was to be reconveyed by the State to the owner, heirs or assigns. The Court, due to the delay in construction, invalidated the Certificate of Take. After the invalidation of the certificate, the State payed to Americana a stipulated sum for the direct physical damage done to the property.

REASON FOR DENYING THE PETITION

THE ITEMS WHICH THE LANDOWNER SEEKS TO RECOVER ARE NOT PROPERTY UNDER THE FIFTH AMENDMENT.

The landowner seeks to recover attorneys' fees, accountant fees, economic and business losses, items which this Court has specifically held are not recoverable, absent a specific statute. See *U.S. v. Bodcaw Company*, 440 U.S. 202, 59 L.Ed.2d 257, 99 S. Ct. 1066 (1979). As stated on page 1066:

> [1, 2] The Fifth Amendment forbids the taking of "private property . . . for public use without just compensation." This Court has often faced the problem of defining just compensation. One principle from which it has not deviated is that just compensation "*is for the property, and not to the owner.*" Monongahela Navigation Co. v. United States, 148 U.S. 312, 326, 13 S.Ct. 622, 626, 37 L.Ed. 463 (1893). As a result, indirect costs to the property owner caused by taking of his land are generally not part of the just compensation to which he is constitutionally entitled. See, e.g., Dohany v. Rogers, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930); Mitchell v. United States, 267 U.S. 341, 45 S.Ct. 293, 69 L. Ed. 644 (1925); Joslin Mfg. Co. v. Providence, 262 U.S. 668, 43 S.Ct. 684, 67 L.Ed. 1167 (1923). See generally 4A J. Sackman Nichols' Law of Eminent Domain, ch. 14 (rev. 3d ed. 1977). *Thus*, [*a*]*ttor-*

neys' fees and expenses are not embraced within just compensation. . . ." Dohany v. Rogers, supra, 281 U.S. at 368, 50 S.Ct. at 302. (Emphasis provided)

These type of damage claims have long and consistently been held not to be compensable upon discontinuance of a condemnation case, in the absence of bad faith. See *VI Nichols Law of Eminent Domain*, § 26.45. Since the condemnation proceedings were terminated, not by the State, but by the court, there could be no bad faith and there was never any evidence presented or argument made suggesting the improvements along Route 1 were being done in bad faith.

The case of *First English Evangelical Church v. County of Los Angeles*, —— U.S. ——, 107 S.Ct. 2378 (1987) cited by the landowner is not applicable. That case involved a regulatory taking, which precluded all use of the property, and involved the taking of a property interest. The subject case involved the condemnation from a landowner who continued in possession and operated his motel as it had always done. In addition, the landowner had $1,596,295 available to it which he elected not to draw down and use, though it had every right to do so, without prejudice. See *Virginia Code*, § 33.1-124. (Appellee's Appendix 19a) The question presented by the Appellant is neither "special" nor "important" within the meaning of Supreme Court Rule 17.

CONCLUSION

The landowner failed to raise and litigate the Fifth Amendment issue in the Trial Court, nor did he appeal the Fifth Amendment issue to the Supreme Court of Virginia; thus, this court should not consider an item which has not been passed upon by the State court system. The indirect costs which landowner seeks to recover are not "property" within the Fifth Amendment concept and therefore have consistently been disallowed; thus, there is

no special or important issue presented for this Court's proper consideration.

Respectfully submitted,

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APPENDIX

APPENDIX

VIRGINIA:

IN THE CIRCUIT COURT
OF ARLINGTON COUNTY

At Law No. 26838

STATE HIGHWAY AND TRANSPORTATION COMMISSIONER,
Petitioner

v.

AMERICANA CORPORATION, a Virginia Corporation, —
61,473 square feet of land located in
Arlington County, Virginia,
Defendant

ANSWER AND GROUNDS OF DEFENSE

COMES NOW Americana Corporation, by counsel, and for answer to the Petition filed herein by the State Highway and Transportation Commissioner states as follows:

1. That it is not necessary for the construction, reconstruction, alteration, maintenance and repair of portions of a highway embraced in the State of Virginia Highway System Notice, Route 95 to acquire all of Defendant's real property. Defendant affirmatively alleges that Petitioner's only need is to acquire 6,517 square feet of permanent easement and 2,208 square feet for a construction easement for the construction contemplated by the said Petitioner. Defendant's property is improved by a motel known as the "Americana Motel" and located at 1400 Jefferson Davis Highway.

2. Defendant admits that the title to the Defendant's real property was duly vested in the Commonwealth of Virginia when Certificate of Deposit no. C-20926 was

recorded among the land records of Arlington County, Virginia, on January 7, 1972 in Deed Book 1774 at Page 400.

3. Your Petitioner has not made a good faith effort or attempt to purchase the property from the owners thereof.

4. With respect to the allegations of paragraph 3 of the Petition, your Defendant admits that condemnation of Defendant's entire parcel which is sought in this proceeding will not result in any damages to adjacent or other property of the said Defendant. However, Defendant asserts that the taking of two easements totaling 8,700 square feet which Defendant alleges is the only taking necessary for construction of the highway pursuant to Petitioner's plans, will not prevent utilization of the remainder of Defendant's property for its present purpose, nor would the Defendant's property be denied access to a public highway, nor would the resulting damages to the remainder of the land approximate or equal the fair market value of the remaining land. Such acquisition of Defendant's remaining property is unnecessary and improper.

5. Petitioner first acquired Defendant's land January 7, 1972 by the filing of the Certificate among the land records of Arlington County, Virginia. Defendant alleges that it is improper to allow Petitioner to delay the appropriate proceedings to complete condemnation of Defendant's property for fourteen (14) years and to base value on 1972 rather than 1986 prices for such land. During the fourteen (14) year period, Defendant has not applied for or received any funds from the Petitioner for this taking. During the fourteen (14) year period, Defendant could not complete construction of his motel, finance the property or remodel the premises.

6. In 1976, Petitioner entered upon Defendant's property, removed its swimming pool and initiated construc-

tion of the highway. During that time the Americana Motel business which is conducted upon Defendant's property was adversely affected, access to Jefferson Davis Highway was denied to Defendant and its customers, traffic flow and circulation were adversely affected. As a result of this construction since 1976 Defendant has not had a swmiming pool for its motel operation, and parking has been seriously affected and decreased and Defendant has suffered serious damages.

7. Pursuant to the terms of Title 33.1-90, of the 1950 *Code of Virginia* as amended, in force in 1972 (the time of the filing of the Certificate of Deposit) Defendant is entitled to and hereby demands a reconveyance of its property to him. Defendant alleges that Defendant has a vested interest in the law of Virginia which was in effect at the time of the taking, and that Petitioner's failure to complete the condemnation proceeding and failure to construct the planned highway within the appropriate period, entitles Defendant to a reconveyance of the said property under Virginia law. Petitioner's taking was a defeasible fee, subject to the provisions of the statute which require a reconveyancy to Defendant by virtue of the passage of time. Defendant alleges that unless the said statute is given full force and effect, Petitioner's present proceeding amounts to an unconstitutional taking of his land without due process of law and in violation of Virginia law.

8. Defendant affirmatively alleges that Petitioner has violated Title 25-248 (c) and (g) of the 1950 *Code of Virginia*, as amended.

WHEREFORE, having fully answered the Petition filed against it herein, your Defendant prays as follows:

1. That the Petitioner be required to reconvey the 61,473 square feet of land located in Arlington County, Virginia, which is the subject of this Petition to the Defendant; and

2. That in the alternative the Certificate of Taking and this Petition be reformed, pursuant to Title 33.1-125 of the 1950 *Code of Virginia* to constitute a taking of 6,517 square feet of permanent highway easement across the front of Defendant's property and an adjacent 2,208 square feet for a construction easement; and

3. That the Court rule that Petitioner be prohibited from asserting damages for the taking and compensation to the owner based on 1972 values because: (a) Petitioner has not proceeded to complete the condemnation proceeding for 14 years; and (b) because Defendant has not taken down any funds represented by the Certificate of Taking nor been compensated in any way for the taking which occurred in 1972 or damages as a result thereof; and

4. That this cause be dismissed as Petitioner has not instituted condemnation proceedings within a reasonable time; and

5. That Defendant be compensated for loss of business over the fourteen (14) year period and its other damages proximately flowing from the taking of its property by Petitioner in 1972.

6. And for such other relief as might be appropriate.

— Americana Corporation

By: /s/ Charles McDonnell Radigan,
CHARLES MCDONNELL RADIGAN,
Its Counsel

BARHAM, RADIGAN & MANNING, P.C.
2009 North 14th Street, Suite 215
Arlington, Virginia 22201
(703) 841-0011

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer in Grounds of Defense was mailed, first class postage prepaid, to William B. Moore, Counsel for Petitioner, this 2d day of May, 1986.

/s/ Charles McDonnell Radigan
CHARLES MCDONNELL RADIGAN

Record No. ——

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

AMERICANA CORPORATION, a Virginia corporation,
Appellant.

versus

STATE HIGHWAY & TRANSPORTATION COMMISSIONER,
Appellee.

PETITION FOR APPEAL

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IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. ——

AMERICANA CORPORATION, a Virginia corporation,
Appellant.

versus

STATE HIGHWAY & TRANSPORTATION COMMISSIONER,
Appellee.

PETITION FOR APPEAL

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

Americana Corporation, Petitioner, is aggrieved by two Orders entered October 8, 1986 limiting and excluding evidence offered to prove damages caused by the filing of an invalid Certificate of Taking by the State Highway and Transportation Commissioner in a condemnation case. The transcript of the proceedings in the Trial Court will be transmitted with the Record by the Clerk of the Circuit Court of Arlington County, Virginia and your Petitioner prays that an appeal be allowed, that said Orders be reversed, that the case be remanded to the Circuit Court of Arlington County, Virginia, and that said Court be ordered to proceed with the hearing on damages occasioned by the filing and duration of the invalid Certificate. Appellant herein shall be referred to as "Americana" and Appellee as the "Commissioner."

NATURE OF THE CASE, STATEMENT OF FACTS AND MATERIAL PROCEEDINGS IN THE TRIAL COURT

This case arises out of a condemnation proceeding where the Trial Court found that the Certificate of Taking filed by the Commissioner was void, invalid and of no further force and effect pursuant to the provisions of Title 33.1-90 of the 1950 *Code of Virginia* and limited evidence of damage resultant from the filing of that certificate to those damages *directly related* to the property and excluded evidence proffered by Americana as to business and economic loss, and attorneys' and accountants' fees.

On or about January 7, 1972, the State Highway Commissioner, now known as the State Highway & Transportation Commissioner, caused to be filed among the land records of Arlington County, Virginia in Deed Book 1774, Page 400, a Certificate of Taking (No. C-20926) for land owned by Americana and described as Lots 1A and 1B of the James A. Watson, Jr. Addition to Pentagon Industrial Center and totalling some 61,473 square feet of land in Arlington County, Virginia, improved by a 102 unit motel building fronting on U.S. Route No. 1 (Jefferson Davis Highway).

The amount set forth in the Certificate as representing the value of the taking was $1,596,295.00. The land taken by the Certificate was used by the Americana Corporation to operate a motel business. The amount represented by the Certificate was never drawn down by Americana. It continued to operate its motel business on the property and does so at the present time. Except for a brief incursion in 1976-77, the Commissioner never took possession of any of Americana's land.

On or about April 10, 1986 the Commissioner filed a Petition in the Arlington County Circuit Court for condemnation of the property owned by Americana Corpora-

tion which had been described on Certificate No. C-20926 filed in 1972. Two lenders, Continental Federal Savings Bank and Sovran Bank, N.A., were given notice of the filing of the Petition, but have made no substantive appearances in the law suit.[1] Americana answered the Petition asserting among other defenses that it had a right to have the property reconveyed to it pursuant to Title 33.1-90 of the 1950 *Code of Virginia*, as amended.

In June of 1986, construction was begun on improvements to U.S. Route 1 which would affect the Americana property and Americana filed a Motion for Injunction praying that construction be enjoined until such time as a valid Certificate of Taking be filed by the Commissioner.

After briefing testimony and oral argument, the Trial Court by Order entered August 1, 1986 determined:

1. That Certificate No. C-20926 was void, invalid and of no further force and effect;

2. That title to the land taken by that Certificate be restored and vested in Americana;

3. That no further construction take place until the Commissioner had taken the property necessary for such construction by appropriate procedures; and

4. That the case be continued for a hearing on the issue of damages occasioned by the taking.

Prior to the hearing on damages, the Commissioner filed a Motion to Strike certain damage claims of Ameri-

---

[1] Continental filed a *pro forma* Answer on May 1, 1986 without responding to the merits and asked that no decree be entered to its prejudice. Sovran Bank filed no pleadings. Neither counsel for the lenders nor any representative thereof made any appearance in any of the subsequent proceedings. The notes, repayment of which were secured by the Deed of Trust to the banks, were paid long prior to the filing of the Petition, although the Deed of Trust was not released of record.

cana. In response to Interrogatories posed by the Commissioner, Americana had stated that at the trial on damages it would claim losses resultant from the fourteen year pendency of the Certificate including:

> 1. Losses from the demolition of the swimming pool, driveway and removal of sign caused by prior construction during 1976-77 immediately prior to a Federal injunction which halted construction at that time;
>
> 2. Accounting and legal fees in connection with opposition to the condemnation proceedings;
>
> 3. Loss of business;
>
> 4. Economic loss because of the inability of Americana to expand or improve its facilities during the fourteen year period.

Americana proffered an expert appraiser and an expert on the motel business to substantiate its damage claims regarding economic loss and loss of business.

After briefing and argument, the Arlington Circuit Court ruled by Orders entered October 8, 1986 that evidence and testimony should be limited at the damage trial to those damages directly related to the property and that damages claimed for attorneys' fees, accountants' fees, business losses or economic damages which may have accrued during the pendency of Certificate No. C-20926 were not cognizable in condemnation proceedings nor contemplated by the provisions of Title 33.1 of the 1950 *Code of Virginia*, as amended. While preserving objection to those Orders, Defendant settled the case with Petitioner with respect to the property damage directly caused by the 1976-77 construction, the Order embodying which was entered by the Court on October 8, 1986. It is from those Orders that the Defendant Americana Corporation appeals.

QUESTION PRESENTED AND ASSIGNMENT OF ERROR

Whether the Court erred in restricting evidence and testimonly of damages to those damages directly related to the property and in ruling that testimony and evidence as to damage suffered relating to attorneys' fees, accountants' fees, business losses and economic damage during the pendency of the taking from January 7, 1972 to August 1, 1986 were not cognizable in condemnation proceedings and are not contemplated by the provisions of Title 33.1 of the 1950 *Code of Virginia*, as amended.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

A. *Once a Certificate of Taking is found to be void and ivalid, damages caused by the taking are recoverable by the landowner.*

Once the Trial Court applied Code § 33.1-90 to invalidate the 1972 Certificate and restored title in Americana, it was appropriate, based upon due process considerations and Code § 33.1-125 which grants jurisdiction over such certificates and authorizes determination of damage caused by mistaken or invalid certificates, to schedule a damage hearing. The *Constitution of Virginia* in Article I, Bill of Rights, requires in Section 11 that citizens cannot "be deprived of life, liberty or property without due process of law; that the General Assembly shall not pass any law . . . whereby private property shall be taken or damaged for public uses, without just compensation. . . ." Code § 33.1-125 addresses and codifies this constitutional requirement with respect to invalid certificates of taking. The legislature provided that a person may show "the damage suffered by reason of such mistake or invalidation of the Ceritificate. . . ." Code § 33.1-125.

B. *Damages considered at such a hearing should not be limited to those direct damages to property resulting*

from invasion by the Commissioner. The Trial Court only allowed damages to compensate Americana for the *destruction* of a swimming pool, driveway and *moving* of a sign when construction of Interstate 595 was attempted on U.S. Route 1 in 1976-77 before being injoined by the United States District Court. The Commissioner argued that only "condemnation-like" damages were recoverable under the provisions of Title 33.1. In routine condemnation proceedings damage evidence concerns the fair market value of the land taken and the damage to any residue of a parcel not taken but affected by the condemnation. Future business loss and profits are not recoverable and are considered too speculative. Valuation of the property taken includes such intrinsic attributes of value. See *Ryan v. Davis* 201 Va. 79, 109 S.E.2nd 409 (1959); *Brown v. May* 202 Va. 300, 117 S.E.2nd 101 (1960).

Here, after the filing of the Certificate, the Commissioner did *not* take possession of the Americana land and Americana continued its motel business, as best it could, in "limbo" for fourteen years. Other than for a few months in 1976-77 affecting a small portion of Americana's land, no road construction was undertaken. The Trial Court found the Commissioner's inaction "statutorily unreasonable and arbitrary" as defined by Code § 33.1-90. The Commissioner filed the Certificate and then abandoned the project. The effect on Americana was enormous. It could not borrow money against the property. It could not improve the motel. It could not expand its business facilities. Ordinary and routine maintenance of its facilities was financially risky because it did not own the property and possession could be demanded by the Commissioner at any time. It had no lease, but was a squatter, a tenant at sufferance. As could be expected, the condition of the premises deteriorated over the fourteen year period. The Commissioner, if the planned road would not be constructed in the foreseeable future, could have withdrawn the Certificate. He chose to do nothing.

It is Appellant's position that in a situation where a certificate of taking is invalidated and land restored by virtue of failure to act by the Commissioner, that the General Assembly provided and due process requires "tort-like" damages for "tort-like" conduct to compensate the landowner. It is conceivable that *no* destruction of property (such as the swimming pool) could have occurred in this case. Then under the Trial Court's ruling, Americana would not be entitled to any damages.

The General Assembly contemplated some type of non-traditional condemnation damage when it enacted Code 33.1-125 for damage suffered by virtue of mistake or invalidation. Code § 25-46.34 provides for payment of legal fees, expert witness fees and compensation for time spent, by the Commissioner to the landowner when *he voluntarily* dismisses a condemnation proceeding. This case involves an *involuntary* dismissal.

This Court recognizes that statutory provisions should be read so as "to promote the ability of the enactment to remedy the mischief at which it is directed." *Jones v. Conwell* 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984).

Consequential damages have been allowed in condemnation cases under the theory that the constitutional words "and damages" broaden the recovery. Negligence is not required so the traditional tort defense of sovereign immunity is not applied. *Heldt v. Tunnell District* 196 Va. 477, 84 S.E.2d 511 (1954).

CONCLUSION

The filing of the Certificate of Taking was wrongful because the Commissioner's delay in utilizing the property condemned became legislatively unreasonable as a matter of law. In what is believed to be a case of first impression, Americana asks to be allowed to prove with reasonable certainty its economic losses proximately caused by the filing of the invalid Certificate. Americana

prays that the Trial Court's Orders of October 8, 1986 which limited proof of damages be reversed and this case be remanded for a hearing on damages occasioned by the filing and duration of the invalid Certificate.

Respectfully submitted,

/s/ Charles McDonnell Radigan
CHARLES MCDONNELL RADIGAN
Counsel for Americana Corporation
Appellant

CERTIFICATE PER RULE 5:17

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Note: *Other Parties Defendant* took no part in the proceedings in this case.

2. A copy of the Petition for Appeal has been mailed or delivered on January 5th, 1987 to all

opposing counsel, other counsel and parties not represented by counsel.

3. Appellant desires to state orally, in person, to a panel of the Supreme Court of Virginia the reasons why this Petition for Appeal should be granted.

/s/ Charles McDonnell Radigan
CHARLES MCDONNELL RADIGAN
Counsel for
Americana Corporation
Appellant

C. Prior to any projects being undertaken pursuant to subsection A of this section, the Department of Transportation and the county will enter into an agreement specifying all relevant procedures for project coordination between the Department and the county, including those relating to contract administration. (1981, c. 321; 1982, c. 218; 1983, cc. 321, 325; 1984, c. 127; 1985, c. 562.)

The 1985 amendment deleted "exceed fifty-five million dollars in any five consecutive fiscal years nor" preceding "diminish the funds" in subsection B.

§§ 33.1-80 33.1-81: Repealed by Acts 1985, c. 42.

§ 33.1-83: Repealed by Acts 1985, c. 42.

ARTICLE 7.

Eminent Domain and Damages.

§ 33.1-89. Power to acquire lands, etc., by purchase, gift or eminent domain; conveyance to municipality after acquisition; property owners to be informed and briefed.

Applied in HMK Corp. v. County of Chesterfield, 616 F. Supp. 667 (E.D. Va. 1985).

§ 33.1-122. Recordation of certificates; transfer of title or interest; land situate in two or more counties or cities.

Applied in HMK Corp. v. County of Chesterfield, 616 F. Supp. 667 (E.D. Va. 1985).

§ 33.1-124. Proceedings for distribution of funds; effect of acceptance of payments; evidence as to amount of deposit or certificate.—Any person or persons shown by such certificate to be entitled thereto may petition the court for the distribution of all or any part of the funds deposited with the court pursuant to § 33.1-120 or represented by a certificate recorded pursuant to § 33.1-121.

A copy of such petition shall be served on the Commonwealth Transportation Commissioner, his deputy or any attorney authorized to accept service with a notice returnable to the court or judge not less than twenty-one days after such service, to show cause, if any, the Commissioner can, why such amount should not be distributed in accordance with the prayers of the petition. If the Commissioner does not, on or before the return day of the petition, show such cause, and if the record in the proceeding does not disclose any denial or dispute with respect thereto, the court shall enter an order directing the distribution of such amount in accordance with the prayers of the petition. However, in the case of a nonresident petitioner the court may in its discretion require a bond before ordering the distribution. If funds have been deposited with the court pursuant to § 33.1-120, any interest which has accrued on the funds shall be payable to the person or persons entitled to receive such funds. If funds are not then on deposit with the court but are represented by a certificate pursuant to § 33.1-121, a certified copy of such order shall forthwith be sent to the Commissioner by the clerk. It shall be the duty of the Commissioner to deposit such funds with the court within twenty-one days of the date of such order. Interest at the rate of eight percent annually shall be payable on such funds from the date of filing of such certificate if the funds are not deposited with the clerk when the certificate is filed. However, no interest shall accrue if an injunction is filed against the Department of Transportation for the taking.

If the Commissioner shows such cause, or if the record in the proceeding discloses any denial or dispute as to the persons entitled to such distribution or to any interest or share therein, the court shall direct such proceedings as are provided by § 25-46.28 for the distribution of awards.

However, the acceptance of such payment shall not limit the amount to be allowed by a commissioner in a

condemnation proceeding, nor limit the rights of any party or parties to the proceeding to appeal from any decision therein; nor shall any party to such proceeding be entitled to introduce evidence of any amount deposited with the court or represented by a certificate, nor of any amount which has been accepted by any party entitled thereto pursuant to this section. (Code 1950, § 33-70.6; 1958, c. 581; 1964, c. 487; 1968, c. 232; 1970, c. 322; 1972, c. 765; 1985, c. 594; 1987, c. 641.)

The 1985 amendment, effective as to pending certificates which were filed on or after Jan. 1, 1985, in the first paragraph deleted "said" preceding "Commissioner" in the first sentence, divided the former third sentence into the present third and fourth sentences, in the present third sentence substituted "the" for "said" preceding "Commissioner," substituted "However," for "provided, however, that" at the beginning of the present fourth sentence, rewrote the present seventh sentence, which read, "Interest at the rate of interest provided in § 6.1-330.9 shall be payable on such funds for any period in excess of twenty-one days from the date of the order directing the distribution of such funds if the court finds that the Commissioner is responsible for the delay in depositing the funds, and the order of the court directing the distribution shall be amended as shall be necessary to provide for the payment of accrued interest," and added the last sentence of the first paragraph, and in the third paragraph substituted "However" for "Provided, however, that."

The 1987 amendment, effective Apr. 8, 1987, substituted "Commonwealth Transportation Commissioner" for "State Highway and Transportation Commissioner" and deleted "thereof in vacation" following "returnable to the court or judge" in the second sentence of the first paragraph, substituted "does not" for "shall not" near the beginning of the third sentence of the first paragraph,

inserted the present fifth sentence of the first paragraph, substituted "Department of Transportation" for "Department of Highways and Transportation" in the final sentence of the first paragraph, and substituted "shows" for "shall show" and "discloses" for "disclose" in the second paragraph.

§ 33.1-128. Awards in greater or lesser amounts than deposit; interest.

Post-award interest controlled by this section.—In a condemnation proceeding, owner was not entitled to post-award interest at the judgment rate, pursuant to § 6.1-330.10, from the date of the order overruling exceptions to the commissioner's report until the completion of the case on appeal. Post-award interest on condemnation awards is controlled by this section, which describes the situations in which interest is to be awarded and provides that in no other instance shall interest be allowed on any award. State Hwy. & Transp. Comm'r v. Cardinal Realty Co., —— Va. ——, 350 S.E.2d 660 (1986).

§ 33.1-129. Agreements as to compensation; petition and order of court thereon; disposition of deposit.

Applied in HMK Corp. v. County of Chesterfield, 616 F. Supp. 667 (E.D. Va. 1985).